Remarks

This amendment responds to the Office Action of August 4, 2008. Claims 1, 4 through 10, and 13-20 remain in this application. Claims 11 and 12 have been cancelled by this amendment and their limitations have been included in Claim 1. Claim 1 is the only independent claim in this application, and claims 4 through 20 depend directly or indirectly therefrom. Reconsideration and passage to allowance is courteously requested.

The present application is concerned with an apparatus which is able to detect and count animals. The apparatus is able to detect each animal in an animal passage even if the animals are walking very close to one another (also sometimes called a "cow train"), so that for example the head of an animal is lying on the body part of the animal in front of it. The detection of each animal is possible by using a sensor device detecting the width of the animals, whereby a signal is sent to a control member when the sensed width is less than a predetermined value. The reduction in width indicates that, provided that the animals are walking in the defined direction of transport, the end of the body part of the animal that is in the measuring area of the sensor device is on its way to leave or has left the measuring area, and that the head of a following animal is on its way into the measuring area. Because the head is always of less width than the body part of the animal, a reduction of the width is always sensed between two animals. See, for example, page 3, line 29 to

page 4, line 2 of the published PCT application. The control member, as mentioned above, receives the signal from the sensor device and is arranged to count the animals that pass through the animal passage.

In the most recent Office Action, claim 1 was rejected under 35 USC §103. It was asserted that a hypothetical combination of U.S. Patent No. 5,673,647 to Pratt and U.S. Patent No. 6,625,302 would render the claimed invention obvious to one of ordinary skill in the art. Applicant respectfully traverses that rejection.

In rejecting claims under 35 U.S.C. § 103(a), it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988). In doing so, the Examiner must make the factual determinations set forth in *Graham v. John Deere*, 383 U.S. 1, 17-18 (1966). The Examiner has the initial burden of presenting a *prima facie* case of unpatentability, whether based on prior art or any other ground. *See In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). "If the PTO fails to meet this burden, then the applicant is entitled to the patent." *In re Glaug*, 283 F.3d 1335, 1338 (Fed. Cir. 2002). Only if the Examiner satisfies the initial burden of establishing a proper *prima facie* case of obviousness does any burden then shift to the applicant to overcome such a properly formed *prima facie* case with argument and/or evidence. *See In re Kumar*, 418 F.3d 1361, 1366 (Fed. Cir. 2005).

In meeting this initial burden, the Examiner "cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention." *In re Fine*, 837 F.2d at 1075. Similarly, it "is impermissible ... to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art." *In re Wesslau*, 353 F.2d 238, 241 (C.C.P.A. 1965). Thus, as the Federal Circuit as consistently held, "[t]he mere fact that the prior art *may be modified* in the manner suggested by the Examiner does not make the modification obvious unless the prior art *suggests the desirability* of the modification." *In re Fritch*, 972, F.2d 1260, 1266 (Fed. Cir. 1992) (emphasis added); *see also In re Gordon*, 733 F.2d 900, 902 (Fed. Cir. 1984).

This desirability of making the claimed combination must be found in the prior art, not in the applicant's disclosure. *See In re Vaeck*, 947 F.2d 488, 490 (Fed. Cir. 1991). Moreover, if the Examiner's proposed combination renders the prior art invention unsatisfactory for its intended purpose, or *changes its principle of operation*, there can be no *prima facie* case of obviousness. *See* MPEP § 2143.01; *In re Gordon*, 733 F.2d at 902.

Finally, as the United States Supreme Court has recently reiterated, the analysis of the interrelated teachings of the prior art references used in a rejection "should be made explicit." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. ___, No. 04-1350, slip op. at 14, 2007 WL 1237837 (2007). To this end, the Federal Circuit has made clear that "rejections on obviousness grounds

cannot be sustained by mere conclusory statements; instead, there must be some *articulated reasoning* with some *rational underpinning* to support the legal conclusion of obviousness." *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added) (cited with approval in *KSR Int'l Co.*, 550 U.S. slip op. at 14). In the present case, these requirements simply have not been satisfied. Therefore, the rejection of independent claim 1 based on obviousness must be removed.

Here, the Examiner is using improper hindsight to pick and choose disclosures from Pratt and Kalscheur and modify those using teachings from Applicants' own presently claimed invention. It is only the present application from Applicants that discloses the desirability of the unique apparatus claimed herein, and the Examiner points to nothing in the prior art that would suggest the desirability of such a proposed modification.

Pratt '647 discloses an animal passage with a first and a second enclosure member as well as a sensor device. However, Pratt does not disclose that the sensor device is arranged to be able to measure the width of the animals. The Office Action of August 4 maintains that this feature is disclosed in the Kalscheur '302 patent, and that it would be obvious to select this feature and combine it with the Pratt patent to provide applicant's invention as set forth and claimed in Claim 1 of the present application.

However, a reading of Kalscheur '302 fails to teach or disclose that a signal is sent to a control member if the sensed width is less than a predetermined value. Instead of providing a signal to control any operation, Kalscheur '302 sends signals to a process unit and infrared wave

length information is used in the process unit to calculate various external dimensions of the animal (see Kalscheur at column 4, line 60 through column 5, line 7).

Applicant has amended claim 1 to further distinguish over the hypothetical combination asserted in the Office Action. Claim 1 now positively recites that the control member is arranged to count the animals passing the animal passage in response to the signals. These are signals from the sensor device which relate to the width of the animals. The Office Action previously asserted that an integrated computer system could be arranged to count the animals, and referenced the Pratt patent disclosing a computer system integrated with the animal managing system. However, nowhere does Pratt actually disclose that this computer system is actually counting the animals. This is simply creative speculation, especially in view of the fact that this is not the object of the system disclosed in Pratt. That object is to determine the various characteristics of the animals in order to be able to sort them into different groups.

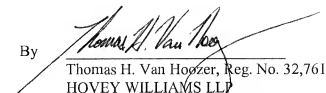
The sensor device according to the present invention senses the animal and sends a signal to the control member if the width of the animal is less than a predetermined value. In contrast, the sensor device as disclosed by Kalscheur '302 is not arranged to send a signal depending on a predetermined value of a parameter such as the width of the animal, but rather the sensor device measures the animal and sends this information to a process unit that calculates various dimensions of the animal. In the present invention a signal is only sent if the value of the width of the animal is less than the predetermined value. When the value of the sensed width of the animal is more than the predetermined value, no signal is sent and the control unit does not

obtain any information. The apparatus of the present invention does not calculate the width of the animal, but rather senses the width of the animal and compares it to a predetermined valuc. This limitation is wholly absent in the Kalscheur disclosure.

Applicant thus respectfully submits that the claims as now amended are in condition for allowance and such is courteously requested. Should the examiner have any issues which may be resolved by a telephone conference, they may be addressed to the undersigned at 1-800-445-3460. Any additional fees necessitated by this submission may be charged to Deposit Account 19-0522.

Respectfully submitted,

HOVEY WILLIAMS LLP

By 

Thomas H. Van Hoozer, Reg. No. 32,761
HOVEY WILLIAMS LLP
2405 Grand Boulevard, Suite 400
Kansas City, Missouri 64108
(816) 474-9050

Docket 36211